Supreme Court, U.S.
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No. 01-189

In The

Supreme Court of the United States

WALTER J. THOMAS, *et al.*,

Petitioners,

v.

COLIN L. POWELL,
Secretary of the Department of State, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petition for Writ of Certiorari

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QUESTION PRESENTED

May the federal district court that approved settlement of a Title VII class action enjoin a subsequent state court suit by individual named representatives for the class action against their former counsel when the state court suit alleges attorney malpractice on grounds that were outside the scope of the class action fairness hearings?

LIST OF PARTIES

The parties in interest to the proceedings below were the plaintiffs- Walter Thomas, Alan B. Latimer, Mary Cynthia Smoot, Odie Fields, and Alfred Neal, and the respondents Akin, Gump, Strauss, Hauer & Feld, L.L.C., and Warren E. Connelly, individually, Warren E. Connelly, P.C., Charles L. Warren, Individually, Charles L. Warren, P.C., Michael J. Madigan, Individually, Michael J. Madigan, P.C., Joseph M. Sellers, Individually, and Avis Buchanan, Individually.

The petitioners before this Court include Walter Thomas, Mary Cynthia Smoot, Odie Fields, and Alfred Neal.

Colin L. Powell, Secretary of the Department of State, is a named party only by virtue of being a party to the Title VII class action pled as basis for the contested injunction. The United States is not a party in interest to this Appeal.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

STATUTE INVOLVED 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE WRIT 4

I. The Anti-Injunction Act is an important limit upon the intrusion of federal courts into matters properly pending in state courts 4

II. The District of Columbia Circuit resolved issues not addressed in the prior federal litigation in order to uphold the lower court's injunction 5

a. The issues of Respondent Counsel's legal malpractice were outside the scope of the Class Action "fairness hearings" 6

b. The issue of damages in the Superior Court malpractice action is not precluded by the class action resolution 9

III. The expansion of the "relitigation exception" by the decision below raises important questions of federal law 10

CONCLUSION 11

TABLE OF AUTHORITIES

Cases:

Chick Kam Choo v. Exxon Corp.,
486 U.S. 140, 100 L.Ed.2d. 127,
108 S.Ct. 1684 (1988) 4, 5, 9, 10

Thomas v. Akin, Gump, Strauss, Hauer
& Feld, L.L.C.,
No.99 ca1 898 (D.C. Super. Ct. 1999) 3

Thomas v. Albright,
77 F. Supp.2d 114 (D.D.C. 1999)..... 1, 3

Thomas v. Albright,
139 F.3d 227 (D.C.Cir. 1998), *cert. denied*,
525 U.S. 1033, 142 L.Ed.2d 480,
119 S.Ct. 576 (1998) ..... *passim*

Thomas v. Christopher,
169 F.R.D. 224 (D.D.C. 1996),
aff'd in part and rev'd in part..... 1, 7, 8

Thomas v. Powell,
247 F.3d 260 (D.C.Cir. 2001)..... 1, 3, 4, 6, 9

Statutes:

28 U.S.C. § 1254 1

28 U.S.C. § 2283 ..... 2, 3, 4

The petitioner Walter Thomas, *et al.* respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled proceeding on 27 April 2001.

OPINIONS BELOW

The opinion of the Court of Appeals for the District of Columbia Circuit is reported at Thomas v. Powell, 247 F.3d 260 (D.C. Cir. 2001), and is reprinted in the appendix. Pet. App. 1. The opinion of the District Court for the District of Columbia is reported at Thomas v. Albright, 77 F.Supp.2d 114 (D.D.C. 1999), and is reprinted in the appendix. Pet App. 19. The opinions in the underlying Title VII class action are reported at Thomas v. Albright, 139 F.3d 227 (D.C. Cir. 1998), cert. denied, 525 U.S. 1033, 142 L.Ed.2d 480, 119 S.Ct. 576 (1998) and Thomas v. Christopher, 169 F.R.D.224 (D.D.C. 1996), and each is reprinted in the appendix. Pet. App. 44 and 65.

JURISDICTION

In their appeal to the Circuit Court, Petitioners challenged the jurisdiction of the District Court on the basis that the injunction at issue was a violation of the Anti-Injunction Act. The District Court's Order of Permanent Injunction was filed on 8 December 1999 and affirmed on 27 April 2001 by the Circuit Court for the District of Columbia after briefing and oral argument. This Court has jurisdiction pursuant to 28 U.S.C. § 1254.

STATUTE INVOLVED

The Anti-Injunction Act –

28 U.S.C. § 2283. Stay of State court proceedings.

A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments. (June 25, 1948, c. 646, 62 Stat. 968.)

STATEMENT OF THE CASE

Walter Thomas and his co-petitioners were Named Representatives in a Title VII class action suit initially filed against the State Department in 1986. The Named Representatives retained Respondent Counsel in December 1988 pursuant to a signed retainer letter. Pet. App. 133. The class action was concluded by a consent order filed by the district court on 7 November 1996 and subsequent appeal of that order decided by the District of Columbia Circuit on 27 March 1998. In March 1999, the Petitioners filed a malpractice action in the Superior Court for the District of Columbia claiming damages suffered as a direct result of Respondents' failure to comply with the terms of their engagement as individual counsel. Petitioners maintain that Respondent Counsel had, through the terms of the retainer agreement, assumed individual responsibilities to the Named Representatives that went beyond their duties to the putative class. Further, Petitioners allege that, in March of 1996, Respondent Counsel entered a "side agreement" with the Department of Justice counsel without revealing that agreement to the Named Representatives. That side agreement insured that the Respondent Counsel would remain silent in the face of the Department of Justice strategy of preventing "opt-outs" by the Named Representatives.

Petitioners further allege that the side agreement did not come to the attention of the Named Representatives until almost a year later. Complaint for Professional Negligence paragraphs 13-18, Thomas v. Akin, Gump, Strauss, Hauer & Feld, L.L.C., No.99ca1898 (D.C. Super. Ct. filed 19 March 1999) ["Complaint"] Pet. App. 116-118. When Mr. Thomas raised the issue of the failure of representation in a hearing before the district court in the Title VII action, the court stated that it was not the proper forum for resolution of the issue. Transcript of hearing 24 April 1997, pp 12-19, Pet. App. 361-365. Ultimately, the Named Representatives did not achieve the ability to opt out of the class and consequently lost the opportunity to pursue their individual damages. See Thomas v. Albright, 139 F.3d 227 (D.C.Cir. 1998), cert. denied, 525 U.S. 1033, 142 L.Ed.2d 480, 119 S.Ct. 576 (1998).

The Named Representatives subsequently sought the proper forum to address the malpractice and unrevealed conflict of interest of their retained counsel by filing suit in the Superior Court for the District of Columbia. Complaint, Pet. App. 111. Respondent Counsel sought an injunction from the district court on the grounds that the approval of the class action settlement necessarily precluded any subsequent claim based upon any failures in their performance as counsel. Petitioners opposed the injunction on the grounds that the Superior Court suit did not seek to challenge the propriety of the class action settlement and that the grounds of malpractice alleged were outside the scope of the class action fairness hearings and had not been previously addressed. The district court found that the relitigation exception to the Anti-Injunction Act (28 U.S.C. §2283) provided authority to enjoin the Superior Court suit on the basis that the adequacy of class counsel had necessarily been determined during approval of the class action settlement. Thomas v. Albright, 77 F.Supp.2d 114 (D.D.C. 1999). Petitioners appealed and a divided panel of the Circuit Court affirmed. Thomas v. Powell, 247 F.3d 260 (D.C.Cir. 2001)(Sentelle, J. dissenting).

REASONS FOR GRANTING THE WRIT

I. The Anti-Injunction Act is an important limit upon the intrusion of federal courts into matters properly pending in state courts.

The continued viable existence of a dual system of federal and state courts is dependent upon a mechanism to define and limit the circumstances under which federal courts may permissibly intervene in state court proceedings. This Court has previously explained the Anti-Injunction Act as "a necessary concomitant" to our dual court system under which "state court proceedings should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court". Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146, 100 L.Ed.2d. 127, 108 S.Ct. 1684, 1689 (1988)(internal cite omitted).

There are specific circumstances under which injunctions of state court actions by federal courts are authorized. The exceptions to the Anti-Injunction Act are enumerated in the language of the act itself: "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283. The third exception is commonly referred to as the "relitigation exception" and is the exception at issue in this case.[1]

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[1]The court below assumed, without deciding, that the Superior Court for the District of Columbia is a "State Court" within the meaning of the Anti-Injunction Act. Thomas v. Powell, 247 F.3d 260, 261 (D.C.Cir. 2001). Consequently, the expansiveness of the relitigation exception is the single issue presented.

This Court has previously explained that the relitigation exception was designed to permit a federal court to prevent state litigation of an issue that was presented to, and decided by, the federal court. As such, the relitigation exception can be viewed as a legislated systemic balance between the countervailing values of judicial restraint and enforced finality. Consequently, " . . . an essential prerequisite for applying the relitigation exception is that the claims or issues which the federal injunction insulates from litigation in state proceedings have been decided by the federal court." Chick Kam Choo, supra., at 148, 108 S.Ct. at 1690. The prerequisite is "strict and narrow", based upon "the precise state of the record", it does not "not permit the District Court to render a *post hoc* judgment as to what the order was intended to say". Id.

Given the purpose of the Anti-Injunction Act, the narrow interpretation of the relitigation exception is entirely consistent and important to the orderly co-existence of the dual court system. This case is important because the court below has expanded the scope of the relitigation exception, threatening the carefully achieved historical balance of the dual-court system.

II. The District of Columbia Circuit resolved issues not addressed in the prior federal litigation in order to uphold the lower court's injunction.

Analysis of the circuit court's issue preclusion rationale supporting the injunction issued by the lower court requires a brief discussion of the malpractice claims at issue in the Superior Court. Petitioners asserted that Respondent Counsel, by the terms of their retainer agreements, had assumed duties and responsibilities to Petitioners beyond any duty or responsibilities Respondent Counsel might have had to the putative class as a whole. Petitioners further asserted a breach of those duties and alleged damages in the form of lost individual causes of action as a result of the breach.

The circuit court held that the class action fairness hearings supported an injunction precluding Petitioners from litigating the Respondent Counsel's breach of duties and that even in the event of breach, the certification of the class under Rule 23(b)(2) prevented the Petitioners from proving any damages in a malpractice action. Thomas v. Powell, supra. at 264, 265. As recognized by the dissenting opinion below, the court's analysis with respect to both issues is flawed. Id. At 266, 267. The circuit court's analysis has led to an expansive application of the relitigation exception that will encourage other federal courts to improperly intervene in state court actions.

a. The issues of Respondent Counsel's legal malpractice were outside the scope of the Class Action "fairness hearings".

Respondent Counsel first committed legal malpractice at the time they presented their engagement letters to the Named Representatives. As they argued in their brief below, it is their position that "as a matter of well-established law, Class Counsel owe[d] [the Named Representatives] no duty to act in their individual interests where those interests were contrary to the interests of the class as a whole." Respondent Counsel's Brief to the Circuit Court at 26. That explanation of duty differs significantly from their Retainer Agreement provision that seems to promise withdrawal if Counsel and Client diverge with respect to the course of the litigation:

> if the Committee and/or the Firm determine on the basis of newly discovered facts or changed circumstances that in their professional legal judgment the claim(s) in this proceeding should be dismissed, settled or otherwise disposed of, and if the Client will not consent to such settlement, dismissal or disposition, the

> Committee and/or the Firm reserve the right to withdraw from further representation in connection with this claim." See Retainer Agreement, Exhibit 1 to the Superior Court Complaint, Pet. App. 134-135.

Respondent Counsel never advised the Named Representatives that even though no class was certified, Respondent Counsel owed their highest duty to the potential of a class and not to the Named Representatives. Even when the Named Representatives voted overwhelmingly to reject the settlement being advocated by Respondent Counsel, Respondent Counsel did not withdraw from representation.

In difficult cases, it is often critical to watch for a shifting of the reference point. In both of the courts below, Respondent Counsel successfully shifted the case reference point from their failure to comply with their professional obligations under the terms of their retainer agreements to a question of the fairness of the Class Action settlement agreement, thus leading those court to agree to apply the relitigation exception to the Anti-Injunction Act.

The Petitioners brought suit against Respondent Counsel on the basis of a failure to serve in the manner retained. Complaint filed in the Superior Court, Pet. App. 111. It is true that fairness of the consent decree and adequate representation of the class as a whole were undeniably litigated and ruled upon in the district court's approval of the settlement and consent decree under Rule 23(e). In fact, the district court found the consent decree to be fair to the class as a whole; but unfair to the Named Class Representatives without adding an opt-out provision. Thomas v. Christopher, 169 F.R.D. 224, 245 (D.D.C. 1996), aff'd in part and rev'd in part, Thomas v. Albright, 139 F.3d 227 (D.C. Cir. 1998), cert denied, 119 S.Ct. 576 (1998). But

fairness of the consent decree to the class as a whole, or even to the Named Class Representatives within the context of the Class, is not at issue in the Superior Court malpractice suit.

The purpose of the Class Action fairness hearing is to insure that the interests of the Class as a whole have been protected. In this case, "The notice of the July 15, 1996 hearing was reasonably calculated, under all of the circumstances, to apprise interested parties of the proposed settlement and afford them an opportunity to comment on the terms of the Consent Decree." Thomas v. Christopher, supra, 169 F.R.D. at 231. The fairness hearing necessarily focused on the terms of the Consent Decree and whether Class Counsel fairly and adequately protected the interests of the class as a whole. There was no provision to explore whether Respondent Counsel had breached any individual duty to the Named Class Representatives. In fact, a review of the transcripts of Mr. Thomas's 20 March 1996 and 15 July 1996 testimony reveals a Court intent on preserving focus on the class as a whole, though clearly receptive to need for opt-outs. Pet. App.169-173 and 360-366. By the time of the 20 March 1996 hearing, the damage born of the Respondent Counsel malpractice was complete; the critical framework of the settlement agreement precluded opt-outs because it did not establish the hybrid nature of the action or the substantially different nature and magnitude of the financial claims of the Named Class Representatives.

The critical failures of Respondent Counsel as personal counsel to the Named Class Representatives occurred long before the consent agreement was reached. In a long and complicated negotiation process, the earlier the Named Class Representatives learned that they needed separate counsel to protect them from Respondent Counsel, the better the opportunity that separate individual counsel could have had impact on the course of the litigation. Had Respondent Counsel timely informed the Named Class Representatives of the conflict, or withdrawn pursuant to the

retainer agreements, the Named Class Representatives would have earlier engaged independent counsel to protect their personal interests. Those failures to inform and failures to withdraw when under conflict are the issues in the Superior Court malpractice suit and they were nowhere addressed in the Class Action fairness hearing.[2] Consequently, the circuit court's holding that the relitigation exception permits an injunction barring resolution of the breach claims in the Superior Court represents an expansive view of issue preclusion and a departure from this Court's precedent requiring the court to look to what the earlier federal order actually said. Chick Kam Choo, supra., 486 U.S. at 148, 108 S.Ct. at 1690.

b. The issue of damages in the Superior Court malpractice action is not precluded by the class action resolution.

As recognized by the dissent below, Thomas v. Powell, supra., at 266, Petitioners are not estopped from proving damages merely on the basis that the certification of class action as a Rule 23(b)(2) class did not permit opt outs. Again, the court below did not limit its decisional basis to

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[2]Nor would one expect that counsel's breach of duties to individual clients should be a part of the fairness hearings – by definition, fairness hearings concern the best interests of the class. A malpractice action is the most natural venue to address counsel's breaches of individual engagement agreements with individuals who are also class members. The potential for malpractice action following case resolution should provide no further concern to potential class counsel than it does for any other lawyer. It should, however, provide impetus for drafting retainer agreements that make clear putative class counsel's primary duty to the putative class and distinctly subservient obligation to the retainer signing Named Representatives. That, in conjunction with fair and adequate counsel during the engagement process, would make clear to potential Named Representatives that they are merely the class action vehicle and neither the driver(s) nor primary passenger(s).

"what the earlier federal order said." Chick Kam Choo, 486 U.S. 148, 108 S.Ct. 1690. Rather the court extrapolated an earlier federal finding based upon a lack of record presented, see Thomas v. Albright, 139 F.3d 227, 235-237 (D.C.Cir. 1998), to conclude that Petitioners would be unable to demonstrate damages. In this way, the court claimed an issue preclusion bar, preventing Petitioners from proving their state claim (which, to succeed, necessarily would include adequate evidence to show that a Rule 23(b)(3) class could have been certified.) As the dissent recognized, the question of whether the class action could have been certified in a different form, under circumstances other than those presented to the court at the time of certification, does not impugn the prior federal holdings in any way. It is simply another issue not previously litigated. The damage preclusion basis for the circuit court's opinion required resolution of issues not litigated and represents an expansion of the relitigation exception to the Anti-Injunction Act.

III. The expansion of the "relitigation exception" by the decision below raises important questions of federal law.

In Chick Kam Choo v. Exxon Corp., this Court emphasized that application of the relitigation exception to permit a federal injunction of a state court action requires the district court to assess "the precise state of the record and what the earlier federal order *actually* said; it [does] not permit the district court to render a *post hoc* judgment as to what the order was *intended* to say." 486 U.S. 148, 108 S.Ct. 1690 (emphasis from original). The decision below has now expanded the relitigation exception to enable an injunction to bar state court resolution of issues never addressed in the prior federal action merely on the basis that the plaintiffs are not likely to succeed in the state court.

The expansion of the federal judiciary's willingness to intervene in state court matters raises important questions with respect to the impact of this more activist federal approach upon the dual court system. Congress and this Court have historically regarded restraint of the federal court system as an important component to the viability of the dual system. The decision below undermines that component.

CONCLUSION

The injunction issued by the district court in this case is an invasion upon the jurisdiction of the Superior Court for the District of Columbia and violates the dictates of the Anti-Injunction Act. The circuit court's affirmance of the injunction required more expansive application of the relitigation exception to the Anti-Injunction Act than has previously been approved by this Court. Consequently, a conflict in an important question of federal law on judicial restraint has been created by the decision below. The Court should grant this petition for certiorari to resolve the conflict.
Respectfully submitted,

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